LIAN SENG PROPERTIES SDN. BHD.

v.

CORPORATE EXPRESS (M) SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
ANUAR ZAINAL ABIDIN J
[ORIGINATING SUMMONS NO. D1-24-347-89]
13 JULY 1990

CIVIL PROCEDURE: *Mareva injunction - Payment of redemption sum - Land subject to two charges - Guarantee - Onus on applicant to prove real danger that assets will be removed from jurisdiction.*

The plaintiffs are the owners of the property known as Kuala Lumpur Plaza ('the property') which had been charged to a consortium of bankers (first charge) and subsequently to AIA (second charge). The first chargee claimed a redemption sum of more than RM77 million from the plaintiffs which the plaintiffs disputed. The plaintiffs also disputed the redemption sum due under the second charge, which was more than RM42 million. In the latter case, the plaintiffs feared that if there is any excess payment of redemption sum the money could be taken out of the jurisdiction. However, although AIA is the second chargee on record, the beneficial interest under the second charge had been assigned to the first defendant. The first defendant is a non-resident controlled company, having no assets, no business operation and no premises whatsoever in Malaysia.

In the meantime, the plaintiffs had filed a counterclaim against the first defendant for wrongful presentation of winding-up petition against the plaintiffs. The plaintiffs' claim is for RM40 million. In the result that the plaintiffs' counterclaim is successful, the excess payment of the redemption sum might not be recoverable if the money is removed from the jurisdiction. The plaintiffs therefore applied for an injunction restraining the first defendant from releasing, removing, transferring, disposing, assigning, etc. the said redemption sum payable or to be paid.

The first defendant denied that they were a party to any wrongful presentation of the winding-up petition. They contended that the plaintiffs' action does not give rise to a set-off.

Held:

[1] The onus is on the plaintiffs (applicant) to prove that there is a real danger that the defendant will remove the assets from, or dissipate them within, the jurisdiction.

[2] There is sufficient evidence of the risk that the money or assets may be removed out of the jurisdiction, since the defendant has no business interest nor do they have any office here.

[3] The first defendant is the assignee of the party which had wrongfully presented the petition for winding-up and as such they took all the benefits and liabilities under the assignment.

[4] There is also evidence that the presentation of the petition for winding-up could amount to malicious prosecution.

[Plaintiff's application granted.]

Legislation referred to:
Companies Act 1965, s. 218(2)(a)

For the plaintiffs/applicants - M.S. Murthi; M/s. Murthi & Partners
For the defendants/respondents - N. Navaratnam; M/s. Shearn Delamore & Co.

JUDGMENT

Anuar Zainal Abidin J:

This is an application (Encl. 11) by the plaintiffs by way of summons-in-chambers for an order of an injunction to restrain the 1st defendant either by itself or by its agents, servants, directors or solicitors its Trustee American International Assurance Co. Ltd. from either paying out, releasing, removing, transferring, disposing, debiting, crediting, assigning, pledging, creating a lien or charge or in any other manner dealing with the redemption sum payable or paid by the plaintiffs or their nominees for redemption of the National Code Charge No. 18166/84, Jilid 356, Folio 41 dated 13 August 1984 over the property known as Kuala Lumpur Plaza either within or without the jurisdiction without the leave of this Honourable Court and the permission of the Controller of Foreign Exchange Malaysia had and obtained.

The plaintiffs are the owners of the property known as Kuala Lumpur Plaza at Bukit Bintang, Kuala Lumpur.

The property is charged to a consortium of bankers (1st charge) and American International Assurance Company Ltd. (AIA) (2nd charge).

The consortium of bankers claimed a sum of RM77,323,265.83 as at 31 October 1989 as the redemption sum. But the plaintiffs disputed the redemption sum and there is a suit pending in respect of the plaintiffs' action against the consortium of bankers.

The plaintiffs are not in particular concerned with the case against the consortium of bankers as they are resident locally and according to the plaintiffs there would be no problem to recover the excess payment in the event the redemption suit turns in the plaintiffs' favour.

In the case of the 2nd charge the plaintiffs contended that they also dispute the redemption sum claimed by the chargee. In this case the plaintiffs contended that there is a danger that the redemption money would be taken out of jurisdiction of this Court once the money is paid.

To put the matter clear although the chargee on record is AIA the beneficial interest in the 2nd chargee has passed on to the 1st defendant.

The 2nd charge was created for the loan of RM30 million granted by AIA to the plaintiffs. For this loan the 2nd defendant Morgan Guaranty Trust Co. of New York (Morgan Trust) stood as guarantor for the due payments by the plaintiffs to AIA. By a deed of assignment dated 26 August 1988 Morgan Trust assigned absolutely to the plaintiffs all principal interest and other sums owing to Morgan Trust by the plaintiffs under the loan agreement and the guarantee agreement. In pursuant to the assignment AIA have executed a transfer of the 2nd charge in favour of the plaintiffs. The transfer document has been duly stamped on 14 September 1989. By virtue of this transfer the 1st defendants are now the beneficial chargee of the 2nd charge.

In respect of the 2nd charge the 1st defendants claimed a redemption sum of more than RM42 million. This sum is disputed by the plaintiffs. Furthermore the plaintiffs contended that they have a counter-claim against the 1st defendants as the assignee of the 2nd

defendants for damages for wrongful presentation of winding-up petition against the plaintiffs on 10 December 1987. The plaintiffs claimed the winding-up petition had crippled the plaintiffs' company for 2 years until the petition was struck out on 26 October 1989. The plaintiffs' claim for damages is estimated to be about RM40 million. In the event that the plaintiffs succeed in the redemption suit the excess payment to the 1st defendants may not be recovered if the money is removed outside the jurisdiction.

The grounds for the plaintiffs' application for the injunction are set out in the affidavit of Lau Hok Choon (Encl. 10).

Lau Hok Choon stated in the affidavit that the 1st defendants' only asset in Malaysia is the debt they purchased from Morgan Trust and the charge on Kuala Lumpur Plaza which secures the debt. The 1st defendants have no other assets. They have no business operation in Malaysia. They do not have any office premises. Their paid-up capital is only RM2.

From the facts, which is not denied, the 1st defendants purchased the debt from Morgan Trust as a nominee of Far East Consortium, a Hong Kong Company, who paid Morgan Guaranty US$7,750,000 in Hong Kong. The 1st defendants are in actual fact a non-resident controlled company. This can clearly be seen from the statement of Bank Negara Malaysia in their letter dated 22 October 1988 (Encl. 10'A').

This application is in the nature of Mareva injunction. The plaintiffs will have to show *inter alia* that there must be a real danger that the defendant will remove the assets from, or dissipate them within the jurisdiction.

There is I think sufficient evidence of the risk that the money or the assets may be removed out of the jurisdiction. The 1st defendants have no business interest in this country nor have they an office. Any money they will receive from the redemption sum would in all probability be taken or removed outside the country. Therefore there is a real risk that the money will be removed from the jurisdiction.

The 1st defendants, however, contended that they are not a party to any wrongful presentation of the winding-up petition. They contended that the plaintiffs' cause of action for wrongful presentation of the petition is a separate action and does not give rise to a right to set-off.

It is true that the 1st defendants did not present the petition for winding-up. The petition was presented by Morgan Trust. However, there is evidence that sometime in March 1989, after Morgan Trust had presented the winding-up petition, the 1st defendants applied to be substituted as the petitioning creditors in the winding-up proceeding. By their action it can be concluded that they were a creditor and as much qualified to be a petitioner. The 1st defendants' application to be substituted as the petitioners was not proceeded with because the petition presented by Morgan Trust was set aside by the Court on 26 October 1989. The 1st defendants contended therefore that the plaintiffs have no cause of action against them.

The plaintiffs' action against the 1st defendants is as the assignee of Morgan Trust. It was contended by the plaintiffs that under the assignment the 1st defendants had acquired the benefit and the obligations under the agreement. In consequence the 1st defendants have derived the liabilities for the wrongful presentation of the winding-up petition by Morgan Trust. The argument is that since the assignment was given after Morgan Trust had allegedly committed the wrongful presentation of the petition. Therefore the 1st defendants took all the benefits together with the liabilities under the assignment.

The plaintiffs referred to clause 2 of the assignment (Encl. 15 "EHY5") which provides that:

> ... owner hereby assigns absolutely and without recourse to the assignee all its rights title and interest in and to the amount of all principal, interest, and other sums owing under the agreements together with all the assignor's rights title obligations and interest ...

From the above provision it is quite clear that the assignment not only conferred the benefits on the plaintiffs/assignees but also placed on them all the burden of liabilities as well. The word "obligation" in clause 2 must necessarily means liabilities existing at the time of the execution of the assignment.

The next question which comes up for consideration therefore is whether there is any liability. Whether the 2nd defendants, Morgan Trust, had presented the winding-up petition wrongfully. Whether Morgan Trust was guilty of malicious prosecution. The defendants contended that there was no wrongful presentation of winding-up petition or malicious prosecution.

The defendants contended that the winding-up petition was presented under the Companies Act 1965 following a statutory demand dated 11 November 1987 pursuant to s. 218(2)(a) of the Act.

From the facts it appears to me that the petition is based on a debt owing by the plaintiffs to Morgan Trust under an agreement between Morgan Trust and the plaintiffs in which Morgan Trust provided a guarantee to pay AIA debts owing by the plaintiffs to AIA. Under clause 5.2 of the agreement if Morgan Trust notified the plaintiffs that AIA had required Morgan Trust (guarantor) to pay any part of the amount guaranteed, the plaintiffs should forthwith on demand pay such amount to Morgan Trust whether or not Morgan Trust had paid off AIA and notwithstanding that the sum called for might not have been properly due.

In this case it is not disputed that AIA had required Morgan Trust to pay the amount guaranteed. However, it is also not denied that it was on the request of Morgan Trust that AIA required them to make the payment. It would appear therefore that the request for payment made by AIA was not in fact a sincere or conscionable request. To my mind this is an attempt to get round the requirement of the guarantee agreement. I am of the view because of this, the petition presented by the defendants may amount to malicious prosecution.

In my judgment there are sufficient grounds for an injunction to be issued.

I would therefore order in terms of the application (Encl. 11) with costs.

Also found at [1990] 2 CLJ 424